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Nos. 945, 946 and 947

In the Supreme Court of the United States

OCTOBER TERM, 1946

JOHN P. McWILLIAMS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ESTATE OF SUSAN P. McWILLIAMS, DECEASED, JOHN P. McWILLIAMS, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

BROOKS B. McWILLIAMS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 945

JOHN P. McWILLIAMS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

No. 946

ESTATE OF SUSAN P. McWILLIAMS, DECEASED, JOHN P. McWILLIAMS, EXECUTOR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

No. 947

BROOKS B. McWILLIAMS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

1. The question in this case is whether the sale of listed securities through the New York Stock

Exchange by members of a family followed by purchases through the exchange of like securities at the same prices by other members of the family, on orders to buy placed simultaneously with the orders to sell, all of which was done for tax avoidance purposes, constituted "sales or exchanges of property, directly or indirectly, between members of a family" within the meaning of Section 24 (b) (1) (A) of the Internal Revenue Code, which provides:

> (b) *Losses from Sales or Exchanges of Property.*—
>
> (1) *Losses disallowed.*—In computing net income no deduction shall in any case be allowed in respect of losses from sales or exchanges of property, directly or indirectly—
>
> (A) Between members of a family, as defined in paragraph (2) (D);

The decisions of the court below holding that the statute applies even though purchases and sales are made through the stock exchange, are in harmony with *Commissioner* v. *Kohn,* 158 F. 2d 32 (C. C. A. 4th), and in substantial conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner* v. *Ickelheimer,* 132 F. 2d 660. Although the court below recognized possible differences between the cases, it placed its decision squarely upon Judge Learned Hand's dissenting opinion in the *Ickelheimer* case. (R. 105.) Accordingly, although we believe the

decision below to be correct, we do not oppose the granting of certiorari with respect to this issue.

2. The action of the court below in reviewing the decision of the Tax Court in the instant case is not in conflict with the decisions of this Court in *Dobson* v. *Commissioner*, 320 U. S. 489; *Commissioner* v. *Scottish American Co.*, 323 U. S. 119; *Boehm* v. *Commissioner*, 326 U. S. 287; *Commissioner* v. *Flowers*, 326 U. S. 465; *John Kelley Co.* v. *Commissioner*, 326 U. S. 521. Those cases have no application where, as here, pure questions of law or statutory constructions are involved, or where there is presented a question of law which may be decided without reference to questions of fact or inferences of fact drawn from the findings of fact. There is here presented a "clear-cut" question of law which is reviewable by the appellate courts. *Dobson* v. *Commissioner*, 320 U. S. 489, 492, 493, and *Commissioner* v. *Kohn*, *supra*. *Trust of Bingham* v. *Commissioner*, 325 U. S. 365, 371.

That the instant case raises a pure question of law is evident from the fact that the Tax Court rested its decision solely upon its prior decision in *Ickelheimer* v. *Commissioner*, 45 B. T. A. 478, affirmed, 132 F. 2d 660 (C. C. A. 2d). It decision was patently that regardless of circumstances, the statutory prohibition against deductions for losses from sales "directly or indirectly" between mem-

bers of a family, does not apply if the sale and purchase are made through stock exchanges. (R. 16.) The decision did not involve a balancing of conflicting inferences; rather, it involved a rule of law which the Tax Court thought had crystallized from the *Ickelheimer* case. It was the correctness of that rule of law that was before the court below for decision.

Accordingly, while we think that the decision below is correct, the granting of writs of certiorari is not opposed because of the existence of a substantial conflict with *Ickelheimer* v. *Commissioner, supra,* and the importance of the problem.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

FEBRUARY 1947.

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